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January 26, 2005

Marlene H. Dortch, Secretary Federal Communications Commission Office of the Secretary, TW-A325 445 12th Street SW Washington, DC 20554

Re: Ex Parte Presentation – Computer III Further Remand Proceedings

(CC Dkt Nos. 95-20, 98-10)

Dear Ms. Dortch:

On January 25, 2005, Dave Baker, Vice President, Law and Public Policy for EarthLink, Inc., and the undersigned met with Ann Stevens and Christi Shewman of the Commission's Wireline Competition Bureau regarding the "Petition for Declaratory Ruling or Waiver of OSS Same Access Requirement" filed by SBC on August 11, 2004 (the "SBC Petition") in abovereferenced dockets. EarthLink discussed the arguments previously filed in its Opposition to the SBC Petition of October 4, 2004. EarthLink also provided the FCC staff with the attached bullet sheet, and discussed the issues raised therein. In sum, EarthLink argued that the SBC Petition is inappropriate for a declaratory ruling, as SBC has provided no reference to FCC precedent that the Commission has "essentially repudiated" the Computer III obligation to provide the "same" OSS to unaffiliated ISPs. Indeed, the Section 271 orders were premised on a detailed state and federal review of the OSS offered to competitive LECs, whereas the Computer III obligation contemplates an entirely different scheme of equal access to OSS for all ISPs. EarthLink also argued that SBC failed to show the waiver requested would be in the public interest because it has not provided evidence to support that the direct access OSS enjoyed by its affiliated ISP would be "comparably efficient" to the mediated access offered to unaffiliated ISPs. Further, EarthLink noted that if SBC moves forward with its plan to provide direct OSS access to the SBC-affiliated ISP and mediated access to unaffiliated ISPs, then the SBC Petition would be moot and the matter should be referred to the Enforcement Bureau.

Pursuant to the Commission's rules, one copy of this memorandum is being filed electronically in each of the above-referenced dockets for inclusion in the public record. Please do not hesitate to call me if you have any questions.

Respectfully submitted,

/s/

Mark J. O'Connor Counsel for EarthLink, Inc. Ex Parte Presentation -- CC Dkt Nos. 95-20, 98-10

SBC's PETITION ON COMPUTER III OSS SHOULD BE REJECTED

FCC Has Clearly Decided That Unaffiliated ISPs Should Have Access to the "Same" Core OSS functions as BOC-affiliated ISP

- "we believe there are serious competitive questions raised by relegating independent ESPs to indirect access status. If, for instance, the BOCs' enhanced services operation has real-time access to OSS information while an independent ESP receives only infrequent access to that same information, the playing field would be far from level." BOC ONA Amendment Order, 5 FCC Rcd. 3103, ¶ 43 (1990).
- Under "equal access," "we require the basic service functions utilized by a carrier-provided enhanced service to be available to others on an unbundled basis, with technical specifications, functional capabilities, and other quality and operational characteristics, such as installation and maintenance times, equal to those provided to the carrier's enhanced services." *Computer III*, ¶ 147.
- The FCC rejected "comparability" or "rough comparability" standards because they would "reduce carrier incentives to develop truly equal forms of interconnection for enhanced services" and because such discretionary standards are more difficult to enforce than a standard of equality. *Computer III*, ¶ 150.

The FCC Has Never Rejected or Repudiated the "Same" OSS Holding

- The two OSS standards are simply different. CLEC mediated access standard is quite stringent in many ways and specific review of BOC's OSS system. *Computer III* approach is prophylactic rule that avoids specific review.
- SBC wants it both ways it does not propose that its OSS system for ISPs be held to the standards for review of mediated OSS suitable for CLECs.

SBC Fails to Demonstrate that Unaffiliated ISPs Will Have a Comparably Efficient OSS

- In the BOC ONA Further Reconsideration Order, the FCC confirmed that the "same" OSS would be required "until the BOCs can demonstrate that indirect access and direct access to the OSS services specified in that order are comparably efficient" BOC ONA Further Reconsideration Order, 8 FCC Rcd. 97, ¶ 4 (1993). "Comparably efficient" involves "such factors as: absence of systematic differences between basic service access given to the carrier and to others, end-user perception of equality, and absence of a difference in the ability of competitors to provide their enhanced services." Id., n.12.
- SBC fails to demonstrate that the mediated and direct access OSS will meet this -standard. Indeed, the SBC Petition fails even to provide the facts to make that determination. A CEI evaluation would necessarily answer such questions as:
 - What systemic differences would exist between the two OSSs?
 - Would consumers perceive any differences in the enhanced services stemming from the differences in the OSSs?
 - Does the SBC ISP have more favorable access to information (such as prequalification data), access to databases (i.e., real-time access), or means of checking on the status of orders?